MALAYSIAN INTERNATIONAL MERCHANT BANKERS BHD.

v.

DHANOA SDN. BHD.

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
GEORGE SEAH SCJ
SYED AGIL BARAKBAH SCJ
[CIVIL APPEAL NO. 9 OF 1987]
26 SEPTEMBER 1987

CIVIL PROCEDURE**:** *Interest - Interest due on sum on Court Order pursuant to s. 257 National Land Code 1965 (NLC) - Lands belonging to chargor/respondent ordered to be sold by public auction - Whether it is a "judgment debt" to apply O. 42 r. 12 Rules of the High Court 1980 [RHC] - Question of interest rate.*

LAND LAW: *Notice of default - Form 16D Notice of Default served on chargor/respondent required to settle within 7 days - Section 255 NLC prescribes minimum period of one month for repayment - Whether Form 16D notice complied with relevant provisions NLC.*

LAND LAW: *Public auction - Order for sale - Omission in order for sale for Registrar to fix reserve price - Whether vitiated court order - Remedy available under O. 20 r. 11 RHC - Whether non-inclusion has prejudiced chargor/respondent.*

LAND LAW: *Order for sale - More than one parcel of lands involved - s. 257(2) NLC - Confers discretionary power on High Court.*

In this case, the High Court had ordered that the charged lands belonging to the chargor/respondent be sold by public auction under s. 257(1)(a) NLC to satisfy the sum of RM2,219,682.70 due to the appellant as at 28 November 1986 with interest thereon at the rate of 8% per annum from 29 November 1986 to the date of realisation. Hence, this appeal by the chargee/appellant against that part of the court order which directed that interest at 8% per annum be paid by the chargor/respondent. There was a cross-appeal by the chargor/respondent against the order for sale made by the High Court.

Held:

[1] Since there was no judgment debt in this case, the learned Judge was wrong to apply O. 42 r. 12 RHC as it has no application to any court order made pursuant to s. 257 NLC.

[2] The appellant's appeal was allowed with costs by deleting that part of the order dealing with interest and substituted the following order immediately after 28 November 1986 "with interest thereon at the rate agreed to between the parties from 29 November 1986 to the date of public auction sale".

[3] The appellant despatched the Notice of Demand dated 4 September 1985 pursuant to s. 10.01(a) of Article X of the Annexure attached to the registered charge and not under s. 255 NLC. It is clear from the statutory notice that it was issued under s. 254 and not pursuant to s. 255 NLC.

[4] An omission in the order for sale of the charged lands for the Registrar of the High Court to fix a reserve price for the purpose of the sale as required under s. 257(1)(d) NLC would not vitiate the Court Order but may be remedied by a subsequent application under O. 20 r. 11 RHC. As the chargor/respondent was unable to show that they had in fact been prejudiced by this non-inclusion, there was no merit in this ground of appeal.

[Appeal allowed with costs. Order accordingly. Cross-appeal dismissed with costs to appellant to be taxed. Deposit ordered to be returned to appellant.]

Cases referred to:
Supreme Finance (M) Bhd. v. Koo Sin Ken [1987] 1 MLJ 296; [1987] CLJ (Rep) 349
American International Assurance Co. Ltd. v. Union Builders (Malaysia) Sdn. Bhd. [1973] 1 MLJ 95

Legislation referred to:
National Land Code 1965, ss. 254, 255, 257(1)(a), (d), (2)
Rules of the High Court 1980, O. 20 r. 11, O. 42 r. 12

For the appellant - H.Y. Too; M/s. Shook Lin & Bok
For the respondent - A. Kanesalingam; M/s. Kanesalingam & Co.

JUDGMENT

George Seah SCJ:

On the application of the chargee/appellant (hereinafter called the appellant) the learned Judge ordered that the charged lands belonging to the chargor/respondent (hereinafter called the respondent) be sold by public auction under s. 257(1)(a) of the National Land Code 1965 to satisfy the sum of RM2,219,682.70 due to the appellant as at 28 November 1986 with interest thereon at the rate of 8% per annum from 29 November 1986 to the date of realisation.

This is an appeal by the appellant against that part of the Court Order directing that interest at 8% per annum be paid by the respondent to the appellant. There is a cross-appeal by the respondent against the Order for sale made by the High Court.

In ordering that only 8% per annum interest rate be paid by the respondent to the appellant the learned Judge purported to rely on O. 42 r. 12 of the Rules of the High Court 1980 and a recent decision of this Court in the case of *Supreme Finance (M) Bhd. v. Koo Sin Ken* [1987] CLJ (Rep) 349. At p. 351 the learned Lee Hun Hoe CJ (Borneo) in giving the judgment of this Court said:

> The question is whether the debt merged in the judgment. Clearly, where a judgment is recovered in respect of a debt any other personal remedy for the same debt is extinguished or merged in the judgment. In which case under O. 42 r. 12 the interest will be at the rate of 8% per annum or such other rate not exceeding 8% per annum as the Court directs from the date of judgment until satisfaction. Order 42 r. 12 makes no distinction between debts in respect of which the parties have made an agreement in respect of interest and those where there is no such agreement ...

With respect, we accept and agree with this exposition of the law. In our opinion, *Supreme Finance* case is clearly distinguishable from the facts of the present case. There the only issue in the appeal concerned the rate of interest to be given after date of judgment. Here, there was no judgment debt. The claim of the appellant in the Court below was in exercise of their statutory remedy against the respondent as chargor in default under the provisions of the National Land Code 1965. The appellant's claim was not under a covenant under the registered charge. In *American International Assurance Co. Ltd. v. Union Builders (Malaysia) Sdn. Bhd.* [1973] 1 MLJ 95 the appellant was the chargee of certain lands on the security whereof the respondent as chargor was given a loan of RM1,250,000 bearing interest at 11% per annum. The chargor defaulted in payment of a number of instalments, as well as interest. Notice of default was given as in Form 16D under s. 254 of the National Land Code. The High Court made an order that the charged lands be sold by public auction to recover the sum of RM1,401,596.24 due to the appellant as on 31 August 1970 together with interest

thereon at 11% per annum from 1 September 1970 to the date of the order and further interest thereafter at 6% per annum to the date of payment or realisation. The then Federal Court allowed the appeal and at p. 96 Ong CJ (Malaya) said:

> The chargees' claim herein was not on the covenant but in exercise of their statutory remedy against a chargor in default. Hence there could not have been any merger. In this connection I might add in parenthesis that, ordinarily, a chargee hardly ever has occasion to sue on the covenant, except where the moneys realised fall short of the amount needed to satisfy his claim for principal and interest. It may also be observed that s. 268 provides for priorities in the application of the proceeds of sale, first towards land rent, secondly expenses connected with the sale and then as follows:
>
> (c) Thirdly, in the payment to the chargee of the total amount due under the charge at the time of sale.
>
> The words in italics, in my opinion, further indicate that interest continues to accrue at the agreed rate until sale. I would accordingly allow the chargees' appeal and direct that the order of Court dated 18 February 1971 be amended to allow interest on the sum then due at the rate of 11 per cent per annum until the date of sale.

We are in complete agreement with the law as expounded by the learned Chief Justice of the High Court in Malaya.

Applying this to the facts of this case and since there was no judgment debt, the learned Judge was wrong to apply O. 42 r. 12. In our opinion, the *Supreme Finance* case is only authority for the proposition that the maximum rate of interest which may be allowed by the High Court in a judgment debt is 8% per annum until full realisation. And O. 42 r. 12 of the High Court Rules 1980 has no application to any Court Order made pursuant to s. 257 of the National Land Code 1965. We therefore allow the appellant's appeal with costs by deleting that part of the order dealing with interest and substitute the following order immediately after 28 November 1986:

> with interest thereon at the rate agreed to between the parties from 29 November 1986 to the date of the public auction sale.

We turn now to deal with the cross-appeal.

It was the submission of learned counsel for the respondent that the order for sale by public auction of the respondent's lands should not have been made by the High Court because the appellant had given a period of seven days only for settlement of the debit balance of RM1,739,082.50 as at 31 July 1985 in their notice of default served on the respondent prior to applying to the Court Order for sale when s. 255 of the National Land Code 1965 prescribes for an a minimum period of one month to be provided for repayment of the principal sum secured by a registered charge. For the appellant it was argued that the order for sale was properly made by the learned Judge and that they had complied with the relevant provisions of the National Land Code 1965.

The appellant appeared to have adopted the following procedure when they decided to recall the loan given to the respondent before resorting to the statutory remedies laid down by the National Land Code 1965. Firstly, the appellant instructed their solicitors to send a notice in writing to the respondent on 4 September 1985 demanding payment of the debit balance of RM1,739,082.50 with interest thereon within seven days from date thereof failing which legal proceedings would be commenced against them for recovery of the same. In making this demand the appellant seemed to have acted under s. 10.01(h) of Article X of the Annexure

attached to the registered charge which provides, *inter alia,* that the whole of the principal amount of the loan together with interest thereon shall become due and immediately payable on demand in writing within seven days:

> (h) if MIMB decides in its sole and absolute discretion that the continuation of the Loan would be likely to be detrimental to its own position or otherwise undesirable or that its security hereunder is in jeopardy.

Secondly, when the respondent failed to repay the sum demanded with interest within the prescribed period they shall be deemed to commit a breach of the agreement and registered charge [see s. 10.01(a)]. And after the breach had continued for more than thirty days the appellant's solicitors sent a statutory notice in Form 16D under s. 254 of the National Land Code 1965 requiring the respondent to remedy the breach and to pay up the sum of RM1,739,082.50 and interest lawfully due within seven days from date thereof otherwise application would be made to the High Court for an order for sale of the charged lands.

It is clear from the summary of the facts that when the appellant despatched the notice of demand dated 4 September 1985 they acted pursuant to s. 10.01 of Art. X of the Annexure attached to the registered charge and not under s. 255 of the National Land Code 1965. It is equally clear from the statutory notice that it was issued under s. 254 and not pursuant to s. 255 of the Code. This ground therefore fails.

Learned counsel for the respondent next argued that the order for sale of the charged lands did not require the Registrar of the High Court to fix a reserve price for the purpose of the sale as required by s. 257(1)(d) of the National Land Code 1965. In our opinion, such an omission would not vitiate the Court Order but may be remedied by a subsequent application made under O. 20 r. 11 of the Rules of the High Court 1980. We like to point out however that in the Originating Summons taken out by the appellant, there was a prayer for an order "that the date of the auction sale, reserve prices and other directions relating to the auction sale be fixed by the Senior Assistant Registrar". As the respondents are unable to show that they had in fact been prejudiced by this non-inclusion we find there is no merit in this ground of appeal.

Lastly, learned Counsel for the respondent complained that the order for sale made without due regard to the provisions of s. 257(2) of the National Land Code 1965. This subsection (2) confers a discretionary power on the High Court to regulate the sale by public auction when more than one parcels of lands are involved, and the Court may give directions whether the charged lands be sold individually or in lots. In our judgement, these directions need not be considered at the time when the application to sell the charged lands is heard but may be dealt with at a later date before the date of the public auction. This ground also fails.

For the above reasons the cross-appeal is dismissed with costs to the appellant to be taxed. The deposit is returned to the appellant.

Also found at [1988] 1 CLJ 8